

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
JONATHAN MONSARRAT,)	
)	
<i>Plaintiff-Defendant in counterclaim</i>)	
)	CIVIL ACTION NO. 17-cv-10356-PBS
v.)	
)	
BRIAN ZAIGER)	
)	AMENDED ANSWER TO
)	COUNTERCLAIM AND
)	COUNTERCLAIM
<i>Defendant-Plaintiff in counterclaim.</i>)	
_____)	<i>Leave granted February , 2018</i>

Plaintiff-Defendant in Counterclaim Jonathan Monsarrat answers Defendant Zaiger's May 26, 2017 Counterclaim (ECF# 24), as follows:

1. Paragraph 1 of the counterclaim states a conclusion of law and no answer is required.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Paragraph 6 of the counterclaim states a conclusion of law and no answer is required.
7. Plaintiff and Defendant in counterclaim admits that on November 9, 2016, he submitted a copyright complaint notice to Cloudflare including Plaintiff's sworn attestation of the registration of copyrights, the 2012 judgment and the continued and ongoing infringing

display on Cloudflare's server and IP address but denies the allegation the allegedly infringing material was "lawfully found on the Encyclopedia Dramatica website."

8. Admitted.

9. Paragraph 9 fails to conform to Fed. R. Civ. P. 8 (d)(1)'s requirement that "each allegation must be simple, concise and direct." To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 9.

10. Plaintiff and Defendant in counterclaim denies that his conduct unlawfully interfered with Defendant Zaiger's business. Plaintiff and Defendant in counterclaim lacks knowledge or information sufficient to form a belief about Defendant Zaiger's state of mind. To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 10.

11. Plaintiff and Defendant in counterclaim lacks knowledge or information sufficient to form a belief about Defendant Zaiger's state of mind. To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 11.

12. No answer is required.

13. Denied.

14. Denied.

15. Denied.

16. Plaintiff and Defendant in counterclaim's November 9, 2016 copyright complaint notice was sent to protect his copyrights. To the extent any further answer is required, Plaintiff and Defendant in counterclaim denies the allegations of Paragraph 16.

17. Denied.

18. Denied.

19. Paragraph 19 fails to conform to Fed. R. Civ. P. 8 (d)(1)'s requirement that "each allegation must be simple, concise and direct." To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 19.

20. Paragraph 20 fails to conform to Fed. R. Civ. P. 8 (d)(1)'s requirement that "each allegation must be simple, concise and direct." To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 20.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Paragraph 25 fails to conform to Fed. R. Civ. P. 8 (d)(1)'s requirement that "each allegation must be simple, concise and direct." To the extent an answer is required, Plaintiff and Defendant in counterclaim denies all allegations of Paragraph 25.

GENERAL DENIAL

Plaintiff and Defendant in counterclaim generally denies each and every allegation of the Defendant's counterclaim except as otherwise expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The counterclaim and each and every cause of action set forth therein fails to state any claim upon which relief may be granted, including without limitation:

- a. Defendant alleges no facts to overcome the presumptive validity of Plaintiff's registered copyrights;
- b. Defendant alleges no facts to demonstrate any one or more of the 17 U.S.C. §107 factors to support his fair use claim; and,

- c. Defendant alleges no facts to demonstrate Plaintiff violated the antitrust laws or the public policy underlying the Copyright Act to support his pleaded claim of copyright misuse.

SECOND AFFIRMATIVE DEFENSE

(Failure to plead with particularity)

Defendant fails to allege with the requisite Fed. R. Civ. P. 9 (b) particularity that Plaintiff made knowingly false representations of material fact.

THIRD AFFIRMATIVE DEFENSE

(Lack of Standing)

The counterclaim and each and every cause of action set forth therein is barred by Defendant's lack of standing.

FOURTH AFFIRMATIVE DEFENSE

(Lack of Standing under Copyright Act)

Defendant does not qualify for the limitations on liability under 17 U.S.C. §512 for lack of a Designated Agent.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The counterclaim and each cause of action set forth therein is barred by Defendant's unclean hands.

COUNTERCLAIM TO COUNTERCLAIM

1. Defendant in Counterclaim, Jonathan Monsarrat, ("Monsarrat" or "Jonathan Monsarrat") brings this counterclaim against plaintiff in counterclaim Brian Zaiger ("Zaiger") for defamation.

2. Monsarrat is a resident of the Commonwealth of Massachusetts. He holds a Bachelor of Science degree in Electrical Engineering and Computer Science from the

Massachusetts Institute of Technology and an Master's Degree in Business Administration from MIT's Sloan School of Management. Monsarrat is a video game entrepreneur developing an internet interactive video game that will be marketed to young people including teenagers of both sexes.

3. Zaiger is resident of the Commonwealth of Massachusetts.

The Encyclopedia Dramatica website.

4. As of early 2011 and to the present Zaiger has been the publicly-undisclosed website administrator of the Encyclopedia Dramatica website in charge of staff, social media, advertising and accounting.

5. As of some time in or about 2011 or 2012 and to the present Zaiger has been the publicly-undisclosed owner of the Encyclopedia Dramatica website.

6. The website Encyclopedia Dramatica has been described as
as the site "where the vast parallel universe of Anonymous in-jokes, catchphrases, and obsessions is lovingly annotated, and you will discover an elaborate trolling culture: **Flamingly racist** and **sexist** content lurks throughout, all of it calculated to offend." [It is] "Wikipedia's evil twin. It's a site where almost every article is biased, offensive, unsourced, and without the faintest trace of **political correctness**. A search through its archives will reveal animated images of people committing suicide, articles glorifying extreme racism and sexism, and a seemingly endless supply of twisted, shocking views on just about every major human tragedy in history.

According to CBS News <https://www.cbsnews.com/news/encyclopedia-dramatica-drama-website-targeted-by-australian-government/>

For the unfamiliar, Encyclopedia Dramatica is like Wikipedia, except instead of striving for a neutral point-of-view, contributors aim for an offensive and adolescent one.

Think South Park. Now, multiply the offensiveness of South Park by the highest number you can think of. There: you're still well short of how

offensive Encyclopedia Dramatica is. An example: the "encyclopedia" has a list of funny things which includes the Holocaust and cancer.

7. At all times material hereto under the direction and control of Zaiger the Encyclopedia Dramatica website's published policy is that neither lawsuits for defamation nor takedown requests under the Digital Millennium Copyright Act can affect Zaiger's operation of the Encyclopedia Dramatica website.

8. At all times material hereto there has been no registered address or identification of a physical location of the Encyclopedia Dramatica website accessible to the public.

9. At all times material hereto there has been no disclosure of the identity of Zaiger as the owner or operator of the Encyclopedia Dramatica website.

10. At all times material hereto there has been no disclosure on any of the publicly accessible domain registration records of the identity and physical location of Zaiger as either the owner or website administrator of the Encyclopedia Dramatica website.

11. At all times material hereto under the control of Zaiger the Encyclopedia Dramatica website informs the world that his website is "physically located somewhere between Nigeria and Romania... [and is bound by] no legislation regarding international copyright."

12. At all times material hereto pursuant to the Encyclopedia Dramatica website's terms of service a user who accesses the website and makes a posting thereby grants the website "a perpetual, irrevocable, worldwide, non-exclusive, royalty-free, sublicensable and transferable license" over the posting for, among other things, commercial purposes including for promotion of Encyclopedia Dramatica products or "third party products or services."

13. As of January 2011 Edrama LLC was the registered agent for the Encyclopedia Dramatica website designated to receive notifications of claimed infringement as required by 17 U.S.C. §512 (c)(2). At no time material hereto thereafter has the Encyclopedia Dramatica website had a designated agent to receive notifications of claimed infringement as required by 17 U.S.C. §512 (c)(2).

14. At all times material hereto according to Zaiger the Encyclopedia Dramatica website does not maintain permanent records of the email address, the Internet Protocol (“IP”) address or other contact information of a user who makes a posting to the website.

15. At times relevant to this action, Zaiger has made postings on Encyclopedia Dramatica using various pseudonym user names including “Mantequilla.”

16. This Court has subject matter jurisdiction because Zaiger’s counterclaim is under 17 U.S.C. §512(f) for which federal question subject matter jurisdiction lies and the defamation claims “derive from a common nucleus of facts of operative facts” as the federal question counterclaim and quite reasonably expected to be tried in a single judicial proceeding. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Background Facts

17. At the MIT graduation on June 2, 2000 Jonathan Monsarrat was a volunteer/performer/guide dressed in a MIT mascot beaver costume featuring a white sweater/tee shirt with MIT on the front; at his request and direction an unknown passerby using Jonathan Monsarrat’s camera took a photo of Jon Monsarrat on the campus, wearing the MIT mascot beaver costume, posing with a young man and two very young girls, upon information and belief, a young father and his two young daughters. Monsarrat later published the June 2, 2000

photograph on his personal MIT student webpage hosted by MIT on the MIT website.

18. Sometime in or about 2008 some anonymous user of the Encyclopedia Dramatica website posted a piece:

“Meet jonmon!

Jonathan Monsarrat, known as jonmon ... at MIT, make_you_laugh on OKCupid and Known as a total idiot the world over, is the world’s most sexually desperate man. At the age of 38, he chases 16 year old girls in the hope of curing his virginity.”

Alongside the “Meet jonmon!” paragraph are two photos, one atop the other each bearing a caption.

The first photo is of Jonathan Monsarrat against a background of some treelined roadway and with an unexplained caption: “Jon Monsarrat reveals his core problem.”

The second photo less than one inch directly beneath the first is a photoshopped alteration of Monsarrat’s beaver costume photo at the June 2, 2000 MIT graduation; now the beaver has been changed into a bear and MIT tee shirt is now “PDB” tee shirt. Pedo is internet slang for pedophile. Beneath the photoshopped pedobear photo is caption: “Jonmon suits up to express his inner self.”

19. According to Wikipedia, <https://en.wikipedia.org/wiki/Pedo>, the word Pedo is commonly used as slang for “paedophile...;” and Pedobear, <https://en.wikipedia.org/wiki/Pedobear>, “is an Internet meme that ... [a]s the name suggests (“pedo” being short for “pedophile”), it is portrayed as a pedophilic bear. It is a concept used to mock pedophiles or people who have any sexual interest in children or jailbait. The bear image has been likened to bait used to lure children or as a mascot for pedophiles.”

20. At the bottom of this jonmon article posted in 2008 on the Encyclopedia

Dramatica website was the following:

How to epically troll this guy

Okay he's got some news articles on him, but we need more. So contact the press to try and get them to write more about him. Enough news articles and there will be a Wikipedia page about his antics.

*Additionally, contact Perverted Justice and Chris Hanson to ask them to work their ebephile-busting magic on him and it'll make some more news articles! ... he tries to lure little kids in with his new prank site.<http://johnnymonsarrat.com/>
[http://johnnymonsarrat.com/jon_monsarrat/jonmonsarrat.](http://johnnymonsarrat.com/jon_monsarrat/jonmonsarrat.htm)*

htm dude, that has all of his emails contact info and anything you ever wanted to troll the sonofabitch.

21. “Trolling” is Internet slang that among other things may be characterized as internet postings or online harassment seeking to destroy a person’s reputation with hateful and untrue statements, an active campaign of fake news. According to Wikipedia, https://en.wikipedia.org/wiki/Encyclopedia_Dramatica, targets of Encyclopedia Dramatica trolling “come from ‘every pocket of the Web,’ ...[including] real people... . The material is presented to appear comprehensive, with extensive use of shock-value prose, drawings, photographs, and the like.”

22. The statements in the 2008 Jonmon article concerning Monsarrat posted on the Encyclopedia Dramatica website, reproduced above, are false and libelous and purport to state facts about Monsarrat which are false.

23. The 2008 Jonmon article refers to Monsarrat by name throughout, was made of and concerning Monsarrat, and was so understood by those who read the article.

24. Sometime in 2011 the 2008 JonMon article, was taken down from the Encyclopedia Dramatica website.

25. As of October 2011 and thereafter at Zaiger's direction the Encyclopedia Dramatica website granted rights to one or more porn websites including F__kbook.com™ to post pornographic advertisements on certain Encyclopedia Dramatica web pages.

26. On October 31, 2011, as "Mantequilla" Zaiger republished on the Encyclopedia Dramatica website a revised version of the 2008 Jonmon page to read:

"Jonathan Monsarrat, known as jonmon ... at MIT, make_you_laugh on OKCupid and Known as a total idiot the world over, is the world's most sexually desperate man. At the age of 38, he chases 16 year old girls in the hope of curing his virginity."

Zaiger deleted Monsarrat's photograph of himself smiling wearing a button shirt standing alongside a tree lined roadway, but left the caption that had accompanied that photo "Jon Monsarrat reveals his core problem," to describe the altered MIT mascot photograph with the superimposed pedobear image.

In the penultimate paragraph of his October 31, 2011 Encyclopedia Dramatica "Jonmon" article Zaiger states "PedoJon is alive and well!"

At the end of the October 31, 2011 Encyclopedia Dramatica "Jonmon" article is an advertisement for F__kbook.com™ with five pornographic images three of which appear to be very young females.¹

27. The statements in the October 31, 2011 Jonmon article concerning Monsarrat posted on the Encyclopedia Dramatica website, reproduced above, are false and libelous and purport to state facts about Monsarrat which are false.

¹ The October 31, 2011 Encyclopedia Dramatica "Jonmon" article is in the record of the case. Doc. 61. Pursuant to the Court's Order, Doc. 56, it remains under seal.

28. The October 31, 2011 Jonmon article refers to Monsarrat by name throughout, was made of and concerning Monsarrat, and was so understood by those who read the article.

29. Zaiger's October 31, 2011 Jonmon article with his addition of the caption "Jon Monsarrat reveals his core problem" to the altered MIT photograph with the superimposed pedobear in physical contact with the two young girls coupled with Zaiger's statement "PedoJon is alive and well!" insinuates that Monsarrat is a pedophile.

30. The altered MIT photograph with the superimposed pedobear in physical contact with the two young girls in conjunction with Zaiger's added caption "Jon Monsarrat reveals his core problem" coupled with Zaiger's statement "PedoJon is alive and well!" is contextually libelous.

31. The statements and the altered photograph with the caption in the October 31, 2011 Jonmon article constitute libel *per se* because they accuse Monsarrat of criminal offenses.

32. The statements and insinuations in Zaiger's October 31, 2011 Jonmon article have adversely affected Monsarrat's video game entrepreneurial efforts to develop products to be marketed to young people of both sexes and have adversely affected his reputation and Monsarrat has been damaged by their publication.

33. Zaiger published the October 31, 2011 Jonmon article for commercial purposes including without limitation placement on the same page--falsely accusing Monsarrat of being a sexual predator of young girls -- of pornographic advertisements for a porn site.

34. The statements in the Encyclopedia Dramatica October 31, 2011 Jonmon article were falsely, maliciously, and intentionally published by Zaiger with intent to cause harm to

Monsarrat.

35. At some unknown time the Encyclopedia Dramatica October 31, 2011 “Jonmon” article was taken down, upon information and belief when the entire Encyclopedia Dramatica website was shut down.

36. Sometime in 2012, Zaiger caused or directed the re-creation of the Encyclopedia Dramatica website.

37. In his capacity as the owner-operator of the re-created Encyclopedia Dramatica website on or before October 22, 2012, Zaiger republished the October 31, 2011 “Jonmon” article initially published by Zaiger as the Encyclopedia Dramatica user/contributor Mantequilla.

38. Upon information and belief the re-created Encyclopedia Dramatica website constituted a substantial modification of the pre-shut down website.

39. Zaiger’s republication in 2012 of the October 31, 2011 “Jonmon” article constitutes a separately actionable republication of the libel.

40. In May 2013, Monsarrat sent a takedown demand to Zaiger’s then Romanian agent complaining of the October 31, 2011 “Jonmon” article’s false allegations that Monsarrat had committed criminal offenses.

41. Upon information and belief Zaiger had actual notice of this May 2013 takedown demand.

42. At all times relevant to this action the registered Internet Protocol (“IP”) address for the Encyclopedia Dramatica website and the server providing access to the Encyclopedia

Dramatica website both belong Cloudflare, Inc., a Delaware corporation headquartered in San Francisco, California (“Cloudflare”).

43. Cloudflare has continuously provided the authoritative nameservers for Zaiger’s website providing a so-called “pass-through security service” which without access to or control over the content on the Encyclopedia Dramatica website acts as a “middleman” that sits between Zaiger’s website and the users who interact with it.

44. Had Monsarrat filed a John Doe lawsuit in 2013, a subpoena to Cloudflare presumably would have revealed that Zaiger was the owner or operator of the Encyclopedia Dramatica website.

45. But because the Encyclopedia Dramatica website does not possess a permanent record of the email address or the IP address of users who make postings, the issuance in 2013 of a follow up subpoena to the Encyclopedia Dramatica website seeking records to identify the pseudonymous poster Mantequilla would have been fruitless.

46. While Monsarrat knew he had been harmed by the October 31, 2011 “Jonmon” article that his harm had been caused by Zaiger was inherently unknowable.

47. In the spring of 2017, Mantequilla took down from the Encyclopedia Dramatica website the October 31, 2011 “Jonmon” article; and in April and May 2017 Zaiger by his emails and conduct admitted he was Mantequilla.

48. It was only in the spring of 2017 when in the exercise of reasonable diligence Monsarrat first learned of facts reasonably enabling an inference that Zaiger was “Mantequilla.”

Zaiger's 2017 fund raising defamation.

49. Following Monsarrat's initial March 2017 lawsuit Zaiger or someone acting at his direction created a fund raising page including text and an accompanying video presentation seeking contributions to "Encyclopedia Dramatica Legal Defense Fund." See <https://www.wesearchr.com/bounties/encyclopedia-dramatica-legal-defense-fund> . The video was posted to <https://www.youtube.com/watch?v=x8nCz1IXFTg> from the Encyclopedia Dramatica account on YouTube, <https://www.youtube.com/channel/UCWkdWGNQIYfggdfhU-59Wng>.

50. In the video the narrator, upon information and belief, Zaiger identifies himself as an administrator for the Encyclopedia Dramatica website.

51. Both in writing and in the accompanying Youtube™ video, in the spring of 2017 Zaiger made a number of a number of false and defamatory statements about Monsarrat.

52. Among the false and defamatory statement are false accusations of separate criminal offenses under Mass. Gen. Laws c. 138§ 34:

"Jonathan Monsarrat got arrested for hosting a party where underage teenage kids were drinking alcohol." "A grown man throwing a party where underage kids are drinking? Getting a little fun poked at him is probably a fair penalty for that." In the video: "Serving alcohol in a house party full of underage girls."

53. Zaiger knew the statements about Monsarrat described above were false and/or recklessly disregarded the falsity of these statements when he published them.

54. The statements on the Encyclopedia Dramatica 2017 fund raising publications including text and an accompanying video presentation seeking contributions to "Encyclopedia

Dramatica Legal Defense Fund” were falsely, maliciously, and intentionally published by Zaiger with intent to cause harm to Monsarrat.

55. The statements on the Encyclopedia Dramatica 2017 fund raising publications including text and an accompanying video presentation seeking contributions to “Encyclopedia Dramatica Legal Defense Fund” adversely affect Monsarrat’s reputation and Monsarrat has been damaged by their publication.

56. The statements on the Encyclopedia Dramatica 2017 fund raising publications including text and an accompanying video presentation seeking contributions to “Encyclopedia Dramatica Legal Defense Fund” have adversely affected Monsarrat’s video game entrepreneurial efforts to develop products to be marketed to young people of both sexes and have adversely affected his reputation and Monsarrat has been damaged by their publication.

57. The on line presence of the statements and insinuations in Zaiger’s October 31, 2011 Jonmon article, upon information and belief even after having been taken down from the Encyclopedia Dramatica website in the spring of 2017, coupled with the 2017 “Encyclopedia Dramatica Legal Defense Fund” defamatory publications have continued to affect Monsarrat’s fund raising efforts to for his new video game venture.

58. In October 2017 one investment firm informed Monsarrat:

Thank you for taking the time to put together the materials for our Investment Committee.

After careful discussion with our team, we will have to pass on the Monsarrat investment opportunity. While we are a huge fan of what you are building, your track record, your team, and the partnership you've inked with the [REDACTED], we ultimately decided to pass due to the negative press you have received in the pass{t} as we have found that this

can have an impact on equity crowdfunding raises given their very public nature.

Please note, this was a very difficult decision for us to make. We are big believers in Monsarrat and your vision and expect you will be a force to be reckoned with in the AR gaming space.

59. As a direct and proximate result of Zaiger's false and defamatory statements Monsarrat has suffered damage to his reputation, damage to his business, and emotional distress.

60. Zaiger is liable to Monsarrat as a result of these false and defamatory statements for damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, as defendant in counterclaim and as plaintiff in counterclaim, Jonathan Monsarrat respectfully requests that the Court enter judgment in his favor and grant the following relief:

- A. Dismissal of Zaiger's 17 U.S.C. §512(f) counterclaim with prejudice;
- B. For costs and attorney's fees under 17 U.S.C. §505 incurred defending Zaiger's 17 U.S.C. §512(f) counterclaim;
- C. For judgment against Brian Zaiger on Jonathan Monsarrat's counterclaim against Brian Zaiger in an amount to be determined at trial; and,
- D. For such other and further relief as the Court deems just and proper.

PRAYER FOR A JURY TRIAL

Pursuant to Fed. R. Civ. P. 38, Jonathan Monsarrat demands a jury trial on all claims, counterclaims, and defenses which are triable to a jury in this action.

DATED: February [], 2018

JONATHAN MONSARRAT,
Plaintiff in counterclaim,

By his attorneys,

ss/
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), on February [], 2018.

/s/ Richard A. Goren